IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-672

UNITED STATES OF AMERICA,
Petitioner,

vs.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, p. A1) is not yet reported. The opinion of the district court (App. D, infra, pp. A4-A7) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra, p. A2) was entered on July 13, 1971. A petition for rehearing was denied on August 20, 1971. (App. C, infra, p. A3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an acquittal of the owner of merchandise on criminal charges alleging unlawful importation of that merchandise into the United States, in violation of 18 U.S.C. 545, bars a subsequent civil forfeiture proceeding directed against the same property that was the subject of the criminal action.

ADDITIONAL STATUTES CONSIDERED

Section 881 of Title 21, United States Code, provides, in pertinent part:

§881. Forfeitures—Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

Section 964 of Title 21, United States Code, provides, in pertinent part:

§964. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

STATEMENT

Pursuant to the Court's Rule 40(3) and with the sincere hopes of eliminating duplicity, the Petitioner's statement of the case is basically accurate, save he failed to inform the Court that the civil forfeiture commenced herein was belatedly filed and only accomplished after considerable urging by the Respondent (App. E, pp. A8-A10).

The Petitioner now additionally advises the Court for the first time, (fn. p. 5), of the protection afforded Norwich Pharmacol, by the Bureau of Customs, 19 U.S.C. 1337(f) 33 F.R. 12680 (T.D. 68-225) (App. D, pp. A4-A7).

The Petitioner additionally attempts to minimize the wisdoms of the Trial Court and the United States Court of Appeals for the Eighth Circuit, by limiting both tribunals' decision to *Coffey* v. *United States*, 116 U.S. 436. It is unassailable that both courts additionally relied on the reasoning displayed in *U. S.* v. *One Ford*, 272 F.2d 704 (10th Cr. 1959); *U. S.* v. *One DeSoto*, 180 F.2d 583 (4th Cr. 1950) (Apps. A and E, pp. A1 and A8-A10).

ARGUMENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

In perusing the Petitioner's Petition filed herein seeking Certiorari, it readily appears that it is urged upon the Court that the decision of the trial court and the Eighth Circuit Court of Appeals (Apps. A, B, E, pp. A1, A2, A8-A10), is in conflict with the reasonings of the First Circuit Court of Appeals, *Leiser* v. *U. S.*, 234 F.2d 648. This statement is made with the hopes of enjoying the Court's CONSIDERATIONS, Rule 19(1b). The forfeiture in *Leiser*, supra, was obtained under 19 U.S.C. 1497, which clearly would not be in conflict with the Eighth, Fourth, or Tenth Circuits Courts of Appeals wisdoms viewed herein, as the

Second Count in *Leiser*, supra, clearly alleged violations of 19 U.S.C. 1497 and 1498; the Court stating, "in both cases he was charged with violating that section", p. 650. Had the Indictment herein included an allegation of a violation of 19 U.S.C. 1460; or possibly as the trial court suggested, a violation of 18 U.S.C. 542, rather than singularly relying on the forfeiture provisions contained in 18 U.S.C. 545, the trial court's reasoning herein, "is restricted to the forfeiture provisions contained in 18 U.S.C. 545", may well have been different. The Petitioner, had he utilized the provisions found in these Statutes, may well have been allowed to commence and succeeded in forfeiting the merchandise herein under the provisions of 19 U.S.C. 1460, or 18 U.S.C. 542.

It readily appears the thinkings expressed by the Eighth Circuit Court of Appeals, is readily expressed and approved in both the Tenth Circuit Court of Appeals and the Fourth Circuit Court of Appeals, *United States* v. *One Ford*, 272 F.2d 704 (10th Cr. 1959); *United States* v. *One DeSoto*, 180 F.2d 583 (4th Cr. 1950), it would therefore appear that the Petitioner would be hard put to enjoy the considerations announced by the Court in its Rule 19(1b).

The Petitioner seeks to suggest to the Court in several instances that "STARE DECISIS, FUNDAMENTAL FAIRNESS, COLLATERAL ESTOPPEL, SAME EVIDENCE TEST" be repudiated or denied and that the Court should now condone "MULTIPLICITY OF PROSECUTION" for the same ACT.

The Petitioner does not, nor is it possible, suggest that the Furazolidone, the merchandise herein, was not the subject matter of the Respondent's criminal prosecution (App. E, pp. A8-A10). He suggests to the Court that an easy disposition herein would be for the Court to allow for a forfeiture under the purview of 19 U.S.C. 1460, without

benefit of STARE DECISIS. It would equally be quite easy for the Court and far less expensive to society, not to mention removing many troublesome areas for the Court to eliminate all appeals, both criminal and civil, however, I would consider the suggestion on my part quite rash, particularly when it also is made without portfolio.

The Petitioner suggests that if the decision of the Court in *Coffey* v. *United States*, supra, is the law, which it is, then they are compelled to elect to seek a forfeiture of the merchandise, 18 U.S.C. 542, or to institute criminal prosecution, 18 U.S.C. 545. Their position is somewhat weak and hardly well taken in that *Coffey*, supra, mandates that they can have both, providing they obtain a conviction, if they proceed under 18 U.S.C. 545.

The Petitioner suggests the merchandise herein was illegally imported merchandise, which a jury of the Respondent's peers found to the contrary on January 15, 1970 (App. D, pp. A4-A7). The Petitioner then commences to replace the contemporaneous objection rule by suggesting to the Court, for the first time, that the mandates of *Coffey*, supra, are in conflict with H.Rep. No. 304, 80th Cong., 1st Sess.; again assuming the merchandise was illegally imported herein; it overrides the integrity of the United States Patent Laws and Regulations; frustrates this Country's trade; economic and foreign policies; encourages the illicit trafficking of drugs and narcotics. The Petitioner aptly states that *Coffey*, supra, was decided and that Congress was aware of the decision when it enacted 18 U.S.C. 545. I think *Coffey*, supra, mandates may well have been reckoned with by Congress, if Congress so desired, as readily suggested by the able Trial Court and the United States Court of Appeals for the Eighth Circuit. If Congress had intended to minimize or

eliminate the fiats expressed in *Coffey*, supra, it would have done so. It would have been a simple proceeding to include in the provisions of 18 U.S.C. 545, the verbiage suggested by the able trial court. (App. D, pp. A4-A7). I think in addition the Petitioner would be hard put to develop these reasonings at this point, particularly in considering the date of the three cases relied on by the lower Courts herein, *Coffey*, 1886; *United States* v. *One Ford*, 1959; *United States* v. *One DeSoto*, 1950. The Petitioner could hardly claim the blessing bestowed by the Court in *O'Connor* v. *Ohio*, 385 U.S. 92.

The Petitioner seeks the Court's ear, however, prefers not its eye, when it suggests that the Court reverse *Coffey*, supra, as the decision could have broad ramifications, "illicit trafficking in drugs and narcotics." May I suggest to the Petitioner that in situations of that nature, it utilize the provisions of 21 U.S.C. 881, 21 U.S.C. 964.

I take no exception to the pronouncements of the Court in *Helvering* v. *Mitchell*, 303 U.S. 391. The Court very clearly distinguished its reasoning from *Coffey*, supra, and specifically held that Coffey WAS NOT OVERRULED. The reasoning viewed in *Helvering*, supra, clearly bespeaks the Petitioner's reasoning in not attempting to obtain the Court's considerations under its Rule 19(1).

It is equally interesting to note that with all of the castigation directed against *Coffey*, supra, by the Petitioner, we find it cited and approved by the Court on April 6, 1970. *Ashe* v. *Swenson*, 397 U.S. 436, 444, fn. 7.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals is not in conflict with the First Circuit Court of Appeals; it readily concurs with the Fourth and Tenth Circuits Courts of Appeals. The Petition viewed herein raises no germane question, at this point, of the customs laws; the Eighth Circuit Court of Appeals' Opinion, further shores our jurisprudence by its compliance and acknowledgement of STARE DECISIS, by not avoiding, repudiating, denying or misstating same, as the Petitioner now suggests to this Honorable Court. The Respondent respectfully suggests that the Petition is without merit and to hopefully protect a vestige of our jurisprudence that the Writ of Certiorari be denied.

Very respectfully submitted,

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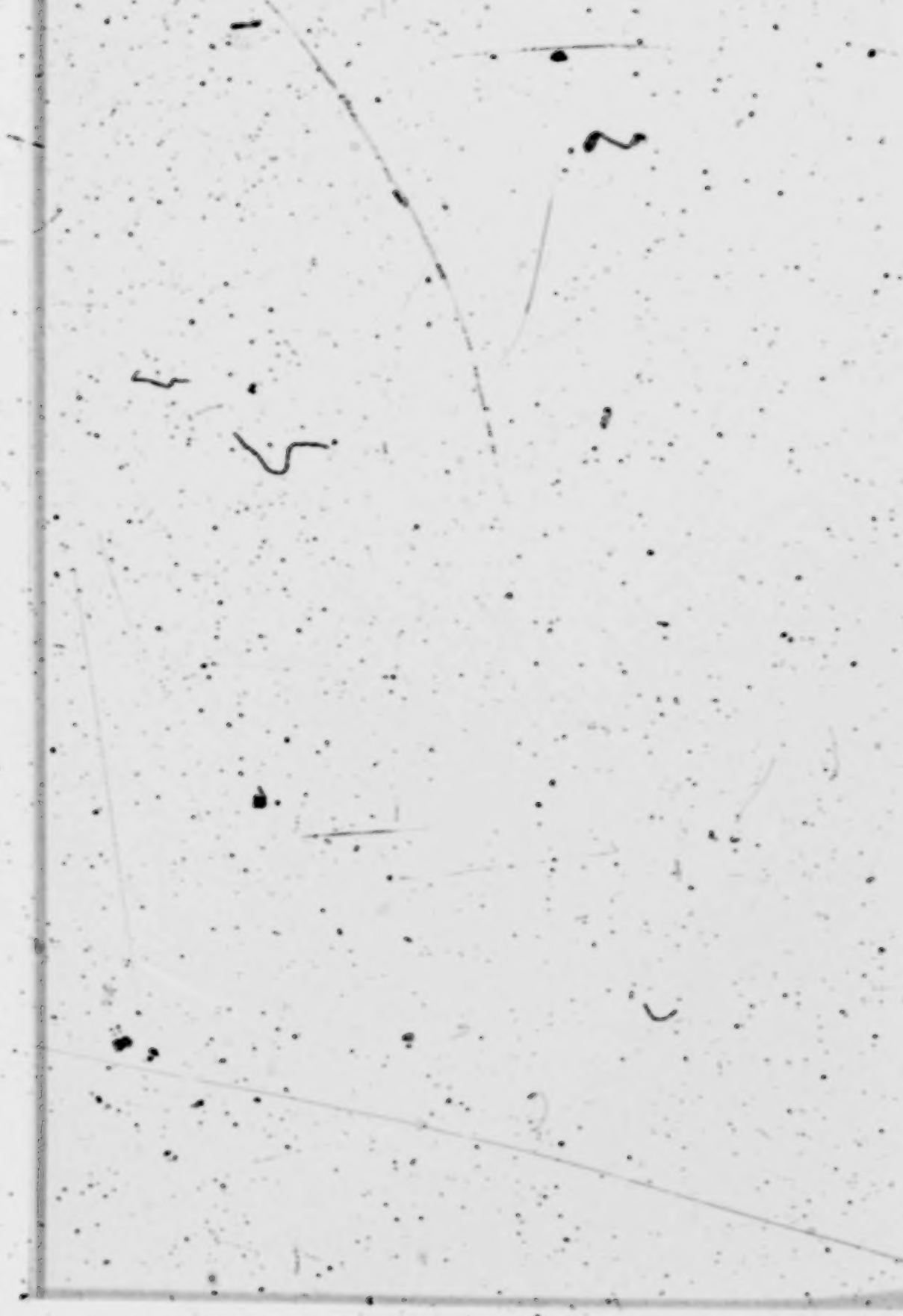
APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 71-1329

UNITED STATES OF AMERICA,
Appellant,

v.

Two Hundred and One Fifty-Pound Bags of Furazolidone,
Defendant,

and

Alvin L. Malz, Intervenor,
Appellee.

Appeal from the United States District Court for the District of North Dakota

Before Van Oosterhout, Mehaffy and Gibson, Circuit Judges.

PER CURIAM.

On June 14, 1971, appellee Alvin L. Malz, as intervenor, filed a motion for summary affirmance under local Rule 8. Appellee contends that the district court's ruling is correct and does not present a substantial question for review. The district court ruled that appellee's acquital of a two-count indictment alleging violations of 18 U.S.C. §545 was a bar to any subsequent forfeiture action under this section, relying primarily on Coffey v. United States, 116 U.S. 436 (1886).

The court has carefully reviewed the motion and the original records of the district court and finds the motion for summary affirmance should be granted under local Rule 8.

It is so ordered.

APPENDIX B

Judgment

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Session, 1971

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR,
Appellees.

On Appeal from the United States District Court
for the District of North Dakota

This Cause came on to be heard on the original files of the United States District Court for the District of North Dakota without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the motion for summary affirmance should be granted under Local Rule 8.

July 13, 1971.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1329

September Term, 1970

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ,
INTERVENOR,
Appellee.

Appeal from the United States District Court
for the District of North Dakota

The Court having considered petition of appellant for rehearing en banc and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

August 20, 1971.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Civil No. 4572

UNITED STATES OF AMERICA,
Plaintiff,

v.

TWO HUNDRED AND ONE FIFTY-POUND
BAGS OF FURAZOLIDONE,
Defendant,

and

ALVIN L. MALZ,
Intervenor.

Memorandum Opinion.

This forfeiture action was commenced by the United States against 201 Fifty-pound bags of Furazolidone seized within the District of North Dakota by agents of the Bureau of Customs, United States Treasury Department, from one Alvin L. Malz. Jurisdiction is predicated upon 28 U.S.C.A. §1355.

Alleging that the Furazolidone had been introduced into the United States from a contiguous territory without having been reported to any customs official, in violation of 19 U.S.C.A. §1459, and that the merchandise had been smuggled and clandestinely introduced into the United States, in violation of 18 U.S.C.A. §545, forfeiture is sought pursuant to both 19 U.S.C.A. §1460 and 18 U.S.C.A. §545.

Contending that he was the owner of the Furazolidone and had a proprietary interest therein, Malz moved to in-

tervene as a party defendant. The motion, not opposed by the plaintiff, was granted and there is now pending the intervenor's motion for summary judgment and for return of the seized merchandise. Before reaching the merits of the intervenor's motion, it is necessary to consider the contention of the Government, in opposition thereto, that the motion is "* * * prematurely sought in that the Complaint for Forfeiture is procedurally brought under the Admiralty and Maritime Claims Section of the Federal Rules of Civil Procedure, * * *" and that the requisite verified claim has not been filed. Supplemental Rules for Certain Admiralty and Maritime Claims, rule C(6).

> Rule A of the Supplemental Rules provides that:
> "These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h)[1] with respect to the following remedies:
>
> * * *
>
> "(2) Actions in rem;
>
> * * *
>
> "The general Rules of Civil Procedure for the United States District Court are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."

Since a motion for summary judgment pursuant to Fed. Rules Civ. Proc. rule 56 may be made at any time by an adverse party and as such motion stays proceedings until such time as it is either granted or denied, it would not be inconsistent to consider a Rule 56 motion prior to

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1. Federal Rules of Civil Procedure.

requiring compliance with the Supplemental Rules for Certain Admiralty and Maritime Claims.[2]

In support of his motion for summary judgment and return of the Furazolidone, Malz has submitted a certified copy of a judgment entered on January 15, 1970, in the United States District Court, District of Minnesota, after a jury trial in which he was found not guilty as to Counts I and II of an indictment charging him with violations of 18 U.S.C.A. §545, that is, the offenses of having smuggled and clandestinely introduced into the United States merchandise which should have been invoiced (the Furazolidone) and of having received, concealed and facilitated the transportation after importation of the merchandise (the Furazolidone) which had been brought into the United States contrary to law.

Citing Coffey v. United States, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684, Malz takes the position that his acquittal of the two-count indictment charging §545 violations is a bar to any subsequent forfeiture proceedings under that or any other forfeiture section.

The intervenor's position is well taken. While Coffey has been criticized, distinguished and questioned an analysis of those cases is not persuasive in view of United States v. One DeSoto, 180 F.2d 583, and United States v. One Ford, 272 F.2d 704. "Any departure from Coffey and its 'uncritical language' must come from the Supreme Court. We are bound by the rule therein announced." (Footnotes omitted) United States v. One Ford, supra.

With respect to the Government's reliance upon 19 U.S.C.A. §1460 as an alternate basis for forfeiture of the

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2. The conclusion reached on the motion for summary judgment makes it unnecessary to decide if the Supplemental Rules for Certain Admiralty and Maritime Claims apply in an action of this nature. See Fed. Rules Civ. Proc. Rule 9(h).

Furazolidone, the short answer is that if Congress intended to provide such an alternate procedure to that contained in 18 U.S.C.A. §545 when a violation thereof is alleged, it could have set forth, as it did in 18 U.S.C.A. §542, a reservation that "nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law."

The Government, having elected to proceed against Malz in the prosecution of 18 U.S.C.A. §545, is restricted to the forfeiture provisions contained therein, and the intervenor having been acquitted of violating that section Coffey is a bar to forfeiture of the Furazolidone. Now, therefore,

IT IS ORDERED that the motion of Alvin L. Malz for summary judgment and return of the 201 fifty-pound bags of Furazolidone, be and the same hereby is granted. Counsel for Malz will prepare and submit form of judgment through the Clerk of this Court.

Dated this 5th day of May, A.D. 1971.

/s/ Ronald N. Davies,
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1329

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE, FIFTY POUND BAGS
OF FURAZOLIDONE,
Defendant,

and

ALVIN L. MALZ,
Intervenor-Appellee.

Appeal from the United States District Court
for the District of North Dakota.

Intervenor-Appellee's Objection to an Additional Stay

Comes now the Intervenor-Appellee, by and through his attorneys, Frank Knox and John C. Humpage, and respectfully objects to the Appellant's Motion for an additional Stay of the Court's Mandate herein, for the following reasons:

The Intervenor-Appellee respectfully shows to the Court that the Court granted the Appellant's request Staying the Court's Mandate on August 31, 1971, for a period of thirty (30) days, prefaced on the Appellant's Petitioning the United States Supreme Court for a Writ of Certiorari, providing proof of same with the Clerk of this Court. The Appellant thereafter filed a Second Motion requesting an additional Stay Order of thirty (30) days

on the grounds that the Application to the United States Supreme Court still remains under consideration by the Department of Justice. The Intervenor-Appellee respectfully shows to the Court in his Affidavit, filed in the United States District Court; and the attachments thereto, R. January 8, 1971, that this matter has been under consideration by the Department of Justice since June 27, 1969, and additionally came into being by the Intervenor-Appellee's letter under date of July 13, 1970, wherein the Intervenor-Appellee forwarded his draft, in the amount of $250.00, which was returned, to serve as a Bond to institute the proceedings herein.

The Intervenor-Appellee's attachment to his Affidavit, part of the Record herein, more particularly Exhibits "A", "B", "C", "D", "E", and "F", clearly bespeaks the efforts expended by the Intervenor-Appellee to cause the institution of the proceedings herein that the Appellant now seeks to additionally stay.

The Intervenor-Appellee also advises the Court that the market value of the merchandise seized by the Government is rapidly decreasing in value and any additional stay may well cause additional irreparable harm to the Intervenor-Appellee.

The Intervenor-Appellee additionally respectfully shows to the Court that the determination by the Department of Justice to Petition the United States Supreme Court for Certiorari was alleged and used in their first Motion asking the Court to stay its Mandate, and now could hardly be construed as "GOOD CAUSE" in seeking their second Stay Order, as Mandated by Rule 41(b) of the Federal Rules of Appellate Procedure. This position was used in their initial Motion filed herein, wherein they assured the Court that the Stay Order sought and obtained

was prefaced on their desire to seek Certiorari. It now appears the assurance as contained in the Appellant's first Motion for a Stay Order was incorrect, as they failed to Petition the United States Supreme Court and now base their second request for a stay of the Court's Mandate on the grounds that that Application "remains under the consideration of the Department of Justice", which clearly could not be considered as good cause.

WHEREFORE, the Intervenor-Appellee respectfully beseeches the Court to deny the Appellant's request for a second Stay of the Court's Mandate for the reasons enumerated above and foregoing.

/s/ John C. Humpage